Liaw Watt Lee & Ors v Baiduri Bank Bhd and another appeal

COURT OF APPEAL (BRUNEI DARUSSALAM) — CIVIL APPEAL NOS 20 OF 2008 AND 21 OF 2008
POWER PCA, MORTIMER AND DAVIES JJCA
23 MAY 2009

Civil Procedure — Estoppel — Issue estoppel — Whether issue estoppel would apply to issue which arises after commencement of action which was not then pursued in action — Principle in Henderson v Henderson

Civil Procedure — Judgment — Consent judgment — Form of — Consent judgment merely recording parties entered into settlement agreement — No order made requiring parties to perform or refrain from doing certain acts — Whether such agreement enforceable without fresh action — Whether principle in Atkinson v Castan intended to confer additional and simpler right on plaintiff

Equity — Estoppel — Issue estoppel — Whether issue estoppel would apply to issue which arises after commencement of action which was not then pursued in action — Principle in Henderson v Henderson

In two separate actions, filed on 3 May 2000 the bank ('Baiduri') sued two borrowers and their guarantors to recover moneys outstanding under financing facilities. On 15 August 2000, the bank applied for summary judgments under O 14 of the Rules of the Supreme Court in both actions. On 11 September 2000, the parties executed a settlement agreement ('the agreement'), wherein it was agreed, inter alia, that a third party was to pay the bank certain sums and the borrowers were to pay the bank monthly instalments. On 30 October 2000, a consent judgment was entered in both actions. However, the borrowers defaulted and on 17 December 2005, the bank filed fresh summary judgment applications in both actions. These applications were dismissed by the SAR but allowed on appeal by the judge in chambers. On appeal to the Court of Appeal, the court found that the consent judgment was intended to extinguish the original causes of action and that the bank was not entitled to summary judgment against the guarantors on the original writs. However, the court found that the position would be otherwise in a fresh action based on the consent judgment. The bank thereafter filed fresh actions based on the agreement and the consent judgment. In these fresh actions, the bank again applied for summary

judgment. The applications were refused by the SAR but allowed on appeal to the judge. The defendants thus appealed against the decision.

Held, dismissing the appeal with costs:

(1) In the instant case, the consent judgment (dated 30 October 2000) had merely recorded that the parties had entered into a consolidated settlement agreement. The only judgment therein was the order withdrawing the summons (in respect of the initial summary judgments). It was doubtful whether the agreement was recorded as part of the order — which was that the summons be withdrawn — entitling the bank to enforce it without a fresh action. In any event, the bank was not precluded from suing on the agreement. The principle in *Atkinson and another v Castan and another* The Times, 17 April 1991 is intended to confer an additional and simpler right upon the plaintiff and not to limit the plaintiff's rights (see paras 9 & 27); *Atkinson and another v Castan and another* The Times, 17 April 1991 referred.

(2) In the instant case, the agreement clearly did not exist when the original actions were filed. The bank could not, no matter how diligent, have relied upon the agreement at the time it commenced the actions on 3 May 2000 (see para 30).

(3) The principle in *Henderson v Henderson* (1843) 3 Hare 100 has never been extended to allow matters which have come into existence after the commencement of proceedings to be taken into consideration when considering whether an issue estoppel has arisen. In the instant case it would not be proper to prevent the bank from recovering on the basis of issue estoppel (see para 33); *Henderson v Henderson* (1843) 3 Hare 100 referred.

(4) The instant action was commenced within the limitation period (see para 34).

[Bahasa Malaysia summary

Dalam dua tindakan berasingan yang difailkan pada 3 Mei 2000, bank ('Baiduri') menyaman dua peminjam dan penjamin mereka untuk mendapatkan kembali wang yang masih tertunggak di bawah kemudahan-kemudahan pinjaman. Pada 15 Ogos 2000, bank memohon penghakiman terus di bawah A 14 Kaedah-Kaedah Mahkamah Besar di dalam kedua-dua tindakan. Pada 11 September 2000, pihak-pihak melaksanakan perjanjian penyelesaian ('perjanjian'), di mana ia dipersetujui, antara lain, bahawa pihak ketiga akan membayar bank jumlah tertentu dan peminjam dikehendaki membayar bank bayaran ansuran bulanan. Pada 30 Oktober 2000, penghakiman persetujuan dimasukkan bagi kedua-dua tindakan. Walau bagaimanapun, peminjam-peminjam ingkar dan pada 17 Disember 2005 bank memfailkan permohonan penghakiman terus yang baru

bagi kedua-dua tindakan. Tindakan-tindakan ini ditolak oleh PKP tetapi dibenarkan atas rayuan oleh hakim dalam kamar. Atas rayuan ke Mahkamah Rayuan, mahkamah mendapati bahawa penghakiman persetujuan adalah diniatkan untuk melenyapkan kausa-kausa tindakan asal dan bahawa bank tidak berhak kepada penghakiman terus terhadap penjamin-penjamin atas writ-writ asal. Walau bagaimanapun, mahkamah mendapati bahawa kedudukan akan menjadi sebaliknya di dalam tindakan baru berdasarkan penghakiman persetujuan tersebut. Bank kemudiannya memfailkan tindakan-tindakan baru berdasarkan perjanjian dan penghakiman persetujuan. Dalam tindakan-tindakan baru ini, bank sekali lagi memohon untuk penghakiman terus. Permohonan-permohonan ditolak oleh PKP tetapi dibenarkan atas rayuan oleh hakim. Defendan-defendan oleh itu merayu terhadap keputusan tersebut.

Diputuskan, menolak rayuan dengan kos:

(1) Dalam kes ini, penghakiman persetujuan (bertarikh 30 Oktober 2000) hanya merekodkan bahawa pihak-pihak telah menandatangani perjanjian penyelesaian yang digabungkan. Satu-satunya penghakiman yang terdapat di dalamnya adalah perintah menarik balik saman-saman (berkaitan penghakiman terus yang awal). Adalah disangsikan sama ada perjanjian tersebut direkodkan sebagai sebahagian perintah tersebut — yang mana adalah bahawa saman-saman ditarik balik — memberikan hak kepada bank untuk menguatkuasakannya tanpa tindakan baru. Oleh itu, bank tidak dihalang daripada menyaman atas perjanjian tersebut. Prinsip dalam kes *Atkinson and another v Castan and another* The Times, 17 April 1991 adalah diniatkan untuk memberikan penambahan dan hak ringkas kepada plaintif dan bukan untuk menghadkan hak-hak plaintif (lihat perenggan 9 & 27); *Atkinson and another v Castan and another* The Times, 17 April 1991 dirujuk.

(2) Dalam kes ini, perjanjian jelas tidak wujud apabila tindakan-tindakan asal difailkan. Bank tidak boleh, bagaimana teliti sekalipun, bergantung atas perjanjian tersebut pada masa ia memulakan tindakan-tindakan tersebut pada 3 Mei 2000 (lihat perenggan 30).

(3) Prinsip dalam kes *Henderson v Henderson* (1843) 3 Hare 100 tidak pernah dilanjutkan untuk membenarkan perkara yang telah wujud selepas permulaan prosiding untuk diambilkira apabila mempertimbangkan sama ada isu estopel telah berbangkit. Di dalam kes ini ia tidak wajar untuk menghalang bank daripada mendapatkan balik atas asas isu estopel (lihat perenggan 33); *Henderson v Henderson* (1843) 3 Hare 100 dirujuk.

(4) Tindakan ini dimulakan dalam tempoh had masa (lihat perenggan 34).]

Notes

For cases on consent judgment, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 3787–3801.

For cases on issue estoppel under civil procedure, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 2615-2625.

For cases on issue estoppel under equity, see 6 *Mallal's Digest* (4th Ed, 2009 Reissue) paras 2855–2857.

Cases referred to

Atkinson and another v Castan and another The Times, 17 April 1991 (refd)
Greenhalgh v Mallard [1947] 2 All ER 255, CA (refd)
Henderson v Henderson (1843) 3 Hare 100 (refd)
Pacific Bank Bhd, The v Chan Peng Leong [1998] 2 MLJ 613; [1998] 2 CLJ 440, CA (refd)
Port of Melbourne Authority v Anshun Pty Ltd (1981) 147 CLR 589 (refd)

Legislation referred to

Limitation Act (Cap 14) [BR] s 9
Rules of the Supreme Court (Cap 5) [BR] O 14

Selvanathan Subramaniam (Fathan Rudi Lee & Lee) for the appellants.
WL Tang (CCW Partnership) for the respondent.

Power PCA:

[1] The original actions were commenced on 3 May 2000. In HCCS 83, the bank sued Yeecom Construction (B) Sdn Bhd ('Yeecom') and its three guarantors for moneys owing under financing facilities of $900,000 granted to Yeecom on 19 June 1997. By 7 February 2000 Yeecom owed the bank $8,918,076.84 under this facility. On 3 May 2000 the bank filed a writ against Yeecom and its guarantors claiming that amount.

[2] In HCCS 85 the bank sued Hytec Engineering Sdn Bhd (Hytec) and its three guarantors for moneys owing under financing facilities $800,000 granted to Hytec on 28 June 1997. By 1 February 2000 Hytec owed the bank $2,764,835.20 under this facility. On 3 May 2000 the bank filed a writ against Hytec and its guarantors claiming that amount.

[3] Defences were filed and on 15 August 2000 the bank applied for summary judgments under O 14 in both actions.

[4] On 11 September 2000 the parties entered into a consolidated settlement agreement under which it was agreed, in cl 7, that the bank would give a global discount of $3,000,000 from the total that the bank was claiming in both actions.

[5] In consideration of this the defendants agreed, inter alia, in cl 8 that consent judgments in both actions would be entered and covenanted to repay the remaining amount owing in the following way:

(a) A third party, Puja Construction Co Sdn Bhd ('Puja'), was to pay certain, to be ascertained, sums.

(b) Certain payments owed and to become owing to Yeecom and Hytec were to be released to the bank.

(c) Yeecom and Hytec were to pay the bank $30,000 each month until their accounts were cleared.

[6] Clause 9 of the settlement agreement stipulated that separate consent judgments would be entered in each action pursuant to the agreement within one week of the signing thereof.

[7] Clauses 11 and 12 stipulated that the bank would not 'utilise their existing rights outside' the settlement agreement 'unless the defendants fail in any of their obligations' under it.

[8] No consents judgments embodying the terms of the settlement agreement were filed but on 30 October 2000, some six weeks after the date of the agreement, what was styled a 'consent judgment' was filed in the following terms:

> BY CONSENT IT IS ADJUDGED that the above parties have agreed to settle the above matter pursuant to the terms of the consolidated settlement agreement (a copy of which is annexed herewith) of both Suit No 85 of 2000 and Suit No 83 of 2000 dated 11 day of September 2000 between the Plaintiffs and the Defendants.
>
> AND IT IS FURTHER ORDERED that the Summons In Chambers entered as No 329 of 2000 be withdrawn.

[9] In reality the only judgment therein was the order withdrawing the summons. The initial paragraph did no more than record that the parties had entered into a consolidated settlement agreement.

[10] Hytec and Yeecom defaulted in the payment of the monthly installments of $30,000.

[11] The bank applied on 26 September 2005 for leave to amend the statement of claim in each suit. Leave was granted without objection. The amendments gave credit for payments already made. A

[12] On 17 December 2005 the bank filed fresh O 14 applications seeking judgment for $18,158,139.70 against Yeecom and its guarantors and $4,242,300.67 against Hytec and its guarantors. On 4 May 2006 both applications were dismissed by the senior registrar as she was satisfied that, because of the consent judgment, she was functus officio. B

[13] On 2006 the bank appealed those decisions to a judge in chambers. Both matters went on before Chong J. On 18 December 2006 he held: C

(a) The defendants had failed to comply with the terms of repayment under the settlement agreement.

(b) By virtue of cll 6 and 7 of the settlement agreement the defendants were obliged to repay as required by cl 8. D

(c) Clauses 11 and 12 preserved the right of the bank to revert to the original claims upon failure of the defendants to comply with the settlement agreement. E

(d) As the defendants were in breach of the settlement agreement the bank was entitled either to revert to the original claims or to enforce the compromise and that the bank could therefore revert to the original claim. He allowed the appeal and entered summary judgments against the three guarantors in the Yeecom action and against Hytec and its three guarantors. Hytec and the guarantors appealed against those decisions. F

[14] These appeals came before the Court of Appeal in Civil Appeals Nos 2 and 3 of 2007. G

[15] A preliminary point was taken in which it was contended that the registrar when ruling herself functus officio had not dealt with the O 14 application and that no appeal lay as regards that application. The Court of Appeal found no merit in this submission. H

[16] The principal argument of the appellants was that when a settlement agreement was embodied in a consent judgment 'it became part of the judgment and the terms of the settlement must be treated as the judgment itself'. I

[17] The Court of Appeal was satisfied that:

> If cll 7 and 8 had stood alone they would clearly have constituted a concluded settlement in the sum stated. The failure to embody them in a judgment pursuant to cl 9 would not affect the binding nature of the settlement agreement that had been reached by the parties. If there was no clause allowing the bank to revive and pursue its original claim it would be entitled in the event of a breach to sue only for the sum stipulated in the settlement agreement. The issue for this court, as it was for the court below, involves a determination of the meaning and effect of cll 11 and 12, seen in the context of the agreement read as a whole.

[18] The appeal court held that the appeal raised two questions:

(a) Did the settlement agreement by reason of cll 11 and 12 allow the bank to revive and continue its original action? (ii) Was this right in any way affected by the incorporation of the settlement agreement into a consent judgment?

(b) Was this right in any way affected by the incorporation of the settlement agreement into a consent judgment?

[19] The appeal court was satisfied that the core issue was whether the 'consent judgment' of 30 October 2000 had the effect of extinguishing the causes of action pleaded in the statement of claim. It found that judgment to be in unusual terms as it was in the first paragraph simply a recital recording the fact of settlement and its terms. The only order was in the second paragraph which ordered 'that the summons in chambers entered as No 329 of 2000 be withdrawn'. The appeal court was satisfied that: 'Here one has a glimpse of the parties' intention relating to the core issue. The application for summary judgment under O 14 based upon the pleaded causes of action was to be withdrawn: one would assume from the wording of the order *permanently* withdrawn.'

[20] The appeal court was satisfied that generally 'when judgment is given in an action, the original causes of action merge in the judgment; the plaintiff's rights to relief as expressed in the statement of claim are extinguished and become rights to enforce the judgment instead'.

[21] The court then asked whether the 'consent judgment' in the present case might have had a different effect. The bank contended it did relying upon cll 11 and 12. The court having considered those clauses which it found were, at best, equivocal and bearing in mind that Puja, a third party, was involved was satisfied that the consent judgment was intended to extinguish

the original causes of action and that the bank was not entitled to summary judgment against the guarantors on the original writs. The court finally stated:

> The position might well be otherwise in a fresh action relying upon the consent judgment.

[22] The bank then in HCCS 131 and 132 of 2007 took action against the appellants based on the settlement agreement and the 'consent judgment'.

[23] It then, in those actions, sought summary judgments. The registrar refused to grant summary judgments and an appeal was made to Judicial Commissioner Findlay. Before him it was argued:

(a) That the actions were res judicata. This submission the rejected pointing to the final words in the judgment of the Court of Appeal.

(b) That there were triable issues as the amounts owing were not certain it being submitted that the bank should be put to 'strict proof' in this regard. This submission the commissioner found confusing as the respondent before him appeared at times to be conceding that they were liable and had not made any challenge before him to the bank's calculations. He found no merit in this ground.

(c) That the actions were time barred. The commissioner was satisfied that the bank was entitled to take action to recover the full amount due under the settlement agreement and consent judgments when it accepted the failure to pay as a repudiation of the whole agreement and that it did so when it issued the letter of demand on 9 August 2007. This ground was, therefore, also rejected.

[24] The commissioner having found that no triable issue had been raised granted summary judgment in each action.

[25] Appeals have now been brought to this court against that decision. In Civil Appeal No 20 the appellants are Law and Jan, two of the guarantors of Yeecom in HCCS 132. In Civil Appeal No 21 the appellants are Hytec and the three guarantors in HCCS 131.

[26] Mr Selva for all appellants contends firstly that the settlement agreement was embodied in the consent judgment and seeks to argue that the bank cannot relitigate matters dealt with and determined by that judgment. He seeks to rely upon the decision of the Court of Appeal in *Atkinson and another v Castan and another* The Times, 17 April 1991 at p 190. This we are satisfied does not assist him. Although the relevant facts of that case are

superficially similar to those in this, it stands as authority only for the proposition that where a judge of first instance concludes that an agreement which required a defendant to do or refrain from doing something is recorded *as part of the decision of the court*, but there is no order requiring that to be done or refrained, the plaintiff is *entitled* to have the agreement enforced without the need for a fresh action because it is implicit in the order that the plaintiff should have liberty to apply.

[27] Here we are inclined to doubt whether the agreement was recorded as part of the order of the court, which was that the summons be withdrawn, so as to have that consequence. In any event, if it were, though the plaintiff would have been entitled to have the agreement enforced without the need of a fresh action, by applying to the court for that purpose, he was not thereby precluded from suing on it. The principle is intended to confer an additional and simpler right, not thereby to limit the plaintiff's rights.

[28] Mr Selva next contended that the bank could have relied upon the settlement agreement in its original actions HCCS 83 and 85. He concedes that the agreement was not in existence at the time when those actions commenced but argues that it would have been open to the bank, had it been exercising reasonable diligence when it applied for leave to amend its statements of claim in those two actions and thereafter when it made O 14 applications therein to have included a claim under the agreement. He relies upon *Henderson v Henderson* (1843) 3 Hare 100 at p 155 as cited in *The Pacific Bank Bhd v Chan Peng Leong* [1998] 2 MLJ 613; [1998] 2 CLJ 440 at p 7 which states:

> The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but every point which belonged to the subject of litigation and which the parties, *exercising reasonable diligence* might have brought forward at the time. (Emphasis added.)

[29] He relies also upon the following citation also from *The Pacific Bank Bhd*'s case citing a judgment of Somerwell LJ in *Greenhalgh v Mallard* [1947] 2 All ER 255 at p 257:

> ... res judicata for this purpose is not confined to the issues which the court is actually asked to decide, but ... it covers issues or facts which are *so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding* to be started in respect of them. (Emphasis added.)

[30] The initial difficulty faced by Mr Selva is that the issues arising out of the settlement agreement could not have been 'clearly part of the subject

matter of the litigation and so clearly could have been raised' as the settlement agreement clearly did not exist when the actions were commenced. The bank could not, no matter how reasonable their diligence, have relied upon it at the time the action was commenced on 3 May 2000. Mr Selva submits, however, that the bank should have amended its statements of claim prior to the hearing of the second O 14 applications on 4 May 2006.

[31] Did the bank fail to exercise reasonable diligence when it failed to do that?

[32] We bear in mind also the following passage from the majority decision in *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589:

> In these cases ... (*Greenhalgh v Mallard* [1947] 2 All ER 255 and *Brisbane City Council* [1979] AC 411) in applying the *Henderson v Henderson* principle to a plaintiff said to be estopped from bringing a new action by reason of the dismissal of an earlier action Somerwell LJ and Lord Wilberforce insisted that the issue in question was so clearly part of *the subject matter of the initial litigation and so clearly could have been raised* that it would be an abuse of process to allow a new proceeding. (Emphasis added.)

[33] The principle in *Henderson v Henderson* has, a far as we are aware, never been extended to allow matters which have come into existence after the commencement of proceedings to be taken into consideration when considering whether an issue estoppel has arisen. Whether such an extension would in some circumstances be proper is not a matter which we are required to consider as we are quite satisfied that in the present circumstances it would not be proper to prevent the bank from recovering on the basis of issue estoppel.

[34] Mr Selva next argued that the limitation period of six years, where there is an action founded on a simple contract as provided by s 9 of Cap 14 of the Limitation Act, had come into play. In the course of argument it became apparent that there was no merit in this contention as it was clear from the affidavit of Mr Raymond A Bariou, the senior deputy manager of the bank, that the last payment by Hytec and Yeecom under the settlement agreement had been made 3 November 2001 and the writ was filed on 1 October 2007. The action was therefore commenced within the limitation period.

[35] Finally Mr Selva submitted that the O 14 summary judgment should not have been granted because of para 4 of the settlement agreement which states:

A 4. The Bank has in addition also appointed corporate receives Messrs Ernest and Young to realize all receivables of the 1st Borrower and the 2nd Borrower under the separate debentures issued by both the said borrowers in favour of the bank.

B **[36]** It was argued that cl 4 of the settlement agreement had given the bank the right through their receivers Messrs Ernst & Young to realise all receivables under certain debentures and that as no credit appears to have been given in this regard a triable issue arises. This submission is without merit. It has never been raised before and we have the affidavit evidence of Mr Bariou, which is unchallenged as to the amounts owing on 7 June 2007 C for which judgment was given by Findlay JC.

[37] This appeal is dismissed. There will be an order nisi that the appellants in each action pay the respondent's costs to be taxed if not agreed.

D **[38]** This order will become absolute at 9am on 27 May unless application is made.

Appeal dismissed with costs.

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Reported by Andrew Christopher Simon

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